ORIGINAL

ORIGINAL

FEB 28 1991
OFFICE OF THE CLERK

No. 90-1130

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

-v.-

ELMER HARPER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DAVID L. LEWIS
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street
10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Respondent HARPER.

TABLE OF CONTENTS

	Page
TABLE OF CASES AND STATUTUES	i
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
The Crime	3
Lester's Failure to Identify Harper as the Robber	4
The Photographic Display and Lineup	5
The Cross Examination of Small at Trial	6
The Summations	7
Charge, Deliberations, Verdict, and Sentence	8
The State Appeals and the Habeas Petition	9
The Court of Appeals Opinion	10
ARGUMENT	12
CONCLUSION	21

TABLE OF CASES AND OTHER AUTHORITIES

Davis v. Alaska, 415 U.S. 308 (1974) 13

Delaware v. Van Arsdall, 475 U.S. at 679 .....11, 14, 16, 20

Dickerson v. Fogg, 526 F. Supp. 1299 (S.D.N.Y. 1981), aff'd, 692 F.2d 238 (2d Cir. 1982) 13

Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986), cert. denied, 484 U.S. 905 (1987) 21

Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990) 21

Holland v. Attorney General, 777 F.2d 150 (3d Cir. 1985) 21

Larson v. Tansy, 911 F.2d 392 (10th Cir. 1990) 21

Manson v. Brathwaite, 432 U.S. 98 (1977) 13

Maryland v. Craig, 110 S. Ct. 3157 (1990) 10

McKenzie v. Risley, 842 F.2d 1525 (9th Cir.) (en banc), cert. denied, 488 U.S. 901 (1988) 21

Olden v. Kentucky, 109 S. Ct. 480 (1988) 17, 18, 20

People v. Harper, 123 A.D.2d 528 (1st Dept. 1986) 2, 9

People v. Harper, 68 N.Y.2d 1001 (1986) 2, 9

Rushen v. Spain, 464 U.S. 114 (1983) 20

United States v. Owens, 108 S. Ct. 838 (1988) 13

United States v. Smith, 563 F.2d 1361 (9th Cir. 1977), cert. denied, 434 U.S. 1021 (1978) 13

QUESTIONS PRESENTED

1. Whether preclusion of cross-examination of the prosecution's crucial eyewitness concerning his mental and emotional state during a thirty-second gunpoint robbery -- an issue directly relevant to the reliability of his eyewitness identification testimony -- violated the Confrontation Clause?

2. Whether the preclusion of cross-examination of the crucial witness in the case on a matter relevant to the crucial issue in the case was harmless where the prosecution's case was based entirely on eyewitness identification testimony, where the victims lacked substantial opportunity to view the robber, where one victim initially failed to identify Harper as the robber because Harper "looked different" than the robber did, and where the first jury to hear the case deadlocked eleven-to-one for acquittal?

3. Whether the court of appeals violated Rule 52(a) of the Federal Rules of Civil Procedure where it "set aside" no factual finding of the district court, and whether this Court should grant certiorari on this issue, which petitioner did not raise in the court of appeals?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

-v.-

ELMER HARPER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is published at 916 F.2d 54. The opinion of the district court (Pet. App. 8a-17a) is reported at 704 F. Supp. 375. On Harper's direct appeal in state court, the New York State Supreme Court, Appellate Division, First Department, affirmed his conviction without opinion in a disposition reported at 123 A.D.2d 528 (1st Dept. 1986). The New York State Court of Appeals denied his application for leave to appeal at 68 N.Y.2d 1001 (1986).

STATEMENT OF THE CASE

Elmer Harper, Jr., was indicted in Bronx County, New York, by indictment number 2873/84, and charged with the gunpoint robbery of Jack Small, which took place on May 9, 1984. Harper was tried twice for this crime. The principal, indeed the only, issue at both trials was whether Harper was accurately identified as the robber. The first trial lasted one day. The jury deliberated for a day and a half, but a mistrial was declared with the jury hung eleven to one for acquittal. Pet. App. at 10a. At the second trial, before the Hon. George D. Covington and a jury, the testimony took but a morning, and the jury deliberated nearly until midnight before being sequestered. The next day it deliberated into the afternoon before finding petitioner guilty of one count of robbery in the first degree.

The Crime

At about 8:00 p.m. on May 9, 1984, Jack Small, the service manager of a Sears Auto Center in the Bronx, put the day's cash receipts in his vest and carried them across a parking lot to the main Sears store. He was accompanied by security supervisor Frank Lester. It was dusk, and the lights in the parking lot were not yet on. As Small and Lester crossed the lot, a man wearing sunglasses, a black rain hat pulled down over his hair and black clothing, came from behind a van. The man put a gun in Small's waist and

demanded the money. Lester told Small not to give it up, but the man threatened to "blow [Small's] fuckin' head off" and Small gave him the vest containing $4000. 28-30, 65, 78-79.[1] The whole incident lasted only about 30 seconds, and Small acknowledged that during this brief period had been looking at the gun the man was holding as well as at the man himself.

No one was identified or apprehended as a suspect in this crime until long after it occurred.

Lester's Failure to Identify Harper as the Robber

Three weeks after the crime, Harper was arrested for shoplifting by Mr. Ducaran, a Sears employee, just outside the Sears store. Lester, who was Sears's security supervisor, went out and assisted with the arrest. He and Ducaran escorted Harper to the Sears security office where Lester spent the next hour with Harper, while Ducaran photographed him and completed paperwork. Lester did not identify Harper as the man who had robbed him three weeks before.

At trial, Lester said he did not recognize Harper as the robber because he "looked different" (82), and he explained:

> I didn't know I was going to apprehend him with Mr. Ducaran. Looking at him the way he looked then and looking at him when he robbed us he looked different. Nothing crossed my mind, sir whether that was him or not, whether it was the robber

---

[1] Numerical citations are to the trial transcript.

or not.

92. Initially, however, at the Wade hearing in the case, Lester had said he did not recognize Harper at the time of the shoplifting arrest because "[a]t the time that he was arrested we didn't know who -- we didn't know he was that person." Transcript of Wade hearing at 52.

The Photographic Display and Lineup

Lester apparently first came to "know [Harper] was that person" as the result of a photographic identification held on June 7, 1984, about a week after he had met Harper at the shoplifting episode. Officer James Sullivan showed him and Small an array of photographs. Neither Lester nor Small could remember what photographs they had been shown, except those of Harper. Officer Sullivan produced at the Wade hearing six photographs he had shown the two men. Of these six, two were of Harper. In one of these two, Harper was wearing sunglasses, as had the robber, and in the other he was without glasses. The remaining four photographs were of other men not wearing sunglasses. This selection of six photographs by itself was clearly highly suggestive, for Harper was represented twice and was wearing garb like that of the robber in one photograph.

Officer Sullivan testified, however, that, in addition to the six photographs he was able to produce, he had shown Small and Lester four other photographs and that these four

happened to have been two additional pairs of photographs of men with and without sunglasses. Sullivan claimed that these two additional pairs had been kept in the same file with the other six pictures, but had disappeared. He could not explain what had happened to them. It was from this array of ten, rather than six, photographs, Sullivan testified, that Small and Lester picked Harper's picture. Even the ten-photograph array tended to suggest, however, that the police suspected one of the three men, including Harper, who were pictured in sunglasses.

Nearly three months after the crime, on July 31, 1984, Small and Lester identified Harper in a police lineup as the robber.

The Cross Examination of Small at Trial

On cross-examination at trial, defense counsel sought to elicit information from Small about his mental and emotional state during the crime. He asked several questions along this line, all of which were thwarted by objections from the prosecutor that were sustained by the court:

> Q. So, the very first time you had an idea there was going to be any kind of a problem here was when somebody bumps into you and tells you to give him the vest, is that correct.
>
> A. Yes, sir.
>
> Q. How did you feel when those words were said?

[Prosecutor]: Objection.
THE COURT: Objection sustained.

Q. Did you have a reaction when those words were said to you?

[Prosecutor]: Objection.
THE COURT: Objection sustained.

Q. Were you scared?

[Prosecutor]: Objection.
THE COURT: Objection sustained.

Q. Had you ever been the victim of a robbery before?

[Prosecutor]: Objection.
THE COURT: Objection sustained.
[Defense counsel]: May I approach?
THE COURT: No, you may not.
[Defense counsel]: May I approach?
THE COURT: No, you may not.

46-47. The trial court then instructed the jury that its rulings were on issues of law, and were not the jury's concern, and directed counsel to proceed. Defense counsel was allowed no other cross-examination of Small concerning his emotions or mental state while he was being robbed, a gun was pointed at him, and his life was threatened.

The Summations

Defense counsel argued in summation that both Small and Lester were "honestly mistaken" in their identifications of Harper as the robber. Counsel noted that neither man got a

good look at the perpetrator and argued that Lester's lack of recogition of Harper just three weeks after the crime showed that the identifications were unreliable. Counsel argued in addition that "I'm sure that both Mr. Lester and Mr. Small were very much afraid as any person would be with a gun stuck in your stomach, especially, I'm sure, one that must appear to be twelve feet long." 158-59.

In the course of the summations, the judge instructed the jury that "[w]hat Counsel on either side of this case says is not evidence," but only "argument." 172.

Charge, Deliberations, Verdict, and Sentence

The court submitted only one count to the jury, robbery in the first degree, and instructed the jury, inter alia, that the People had to prove Harper's identity as the perpetrator beyond a reasonable doubt. In the course of its charge, the court noted that in assessing the identification testimony, the jury could consider "[w]hat was the mental and emotional state of the witness." 204. And the court further charged that the "jury's sworn duty" was to decide the case "solely on the evidence admitted during the trial." 182-83.

The jury commenced its deliberations at noon on September 11, 1985. It deliberated all the rest of that day and into the night, until, at 11:00 p.m., it was sequestered. The following morning, September 12, 1985, the jury asked for and received a reading of the direct testimony of Small and

Lester, and re-instruction on the criteria to use in deciding whether to accept a witness's testimony. The jury returned with its verdict that afternoon, finding Harper guilty of robbery in the first degree.

On October 4, 1985, Harper was sentenced as a second violent felony offender to ten to twenty years in prison.

The State Appeals and the Habeas Petition

Harper appealed his conviction claiming that the trial court's restrictions on his cross-examination of Small had violated his rights to confront the witnesses against him. On September 30, 1986, the New York State Supreme Court, Appellate Division, First Department, affirmed his conviction without opinion. People v. Harper, 123 A.D.2d 528 (1st Dept. 1986). On November 24, 1986, the New York State Court of Appeals denied his application for leave to appeal. People v. Harper, 68 N.Y.2d 1001 (1986).

Harper filed a petition for a writ of habeas corpus again raising his confrontation claim. The district court correctly characterized Harper's argument as being that the "right to confront witnesses gives a defendant a right to cross examine an identification witness on the circumstances under which he or she saw the perpetrator," Pet. App. at 14a, and the court noted that Harper cited cases indicating that "the emotional reaction of a robbery victim can have a bearing upon his or her identification." Pet. App. at 14a.

Althought the court stated that these principles were "not applicable" in Harper's case, it did not reach the consitutional issue but instead determined that any error committed was harmless. Pet. App. at 14a. This was so, the court held, because Harper had been able to cross-examine Small and Lester on other subjects, because Lester's testimony, although weak, corroborated Small's, because defense counsel hypothesized in summation that Small and Lester had been afraid, and because the trial court had instructed that jury that it could consider "the mental and emotional state of the witness." Pet. App. at 15a.

The Court of Appeals Opinion

The court of appeals held that the preclusion of all inquiry into the victim's emotional state during his observation of the robber, which formed the basis for identification of the defendant, violated the defendant's Sixth Amendment right to confront his accusers and was not harmless in this case. Pet. App. at 1a-2a. The court noted that the "central concern" of the Confrontation Clause was to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Pet. App. at 4a, citing Maryland v. Craig, 110 S. Ct. 3157, 3163 (1990), a concern that was "especially critical when the only evidence against an accused is eyewitness identification." Pet. App.

at 5a. In such cases, "the defendant must be afforded a meaningful opportunity to probe the reliability of that testimony," and "one of the most significant means to probe such testimony can be to question the witness about his thoughts and fears at the time of the crime." Pet. App. at 5a. Because the trial court had denied the defendant a "meaningful opportunity" to impeach the witness on this basis, the court held that Harper's rights under the Confrontation Clause had been violated. Pet. App. at 6a.

The court of appeals also held that the error was not harmless under the standard set out by this Court in Delaware v. Van Arsdall, 475 U.S. at 684. The court noted that the case was "based solely on eyewitness identification" and that Small's testimony was the "key (and perhaps the only) evidence that the jury considered in convicting Harper." The court found that, because Lester had initially not identified Harper as the gunman, his testimony could not have carried much weight with the jury, and Small's testimony, which had not been subject to full cross-examination, was crucial. Pet. App. at 7a. The court rejected the state's claim that the error was harmless because Harper was allowed to argue that fear might have affected Small's perceptions on the basis that "as juries are admonished during every trial, counsel's arguments cannot substitute for actual evidence." Pet. App. at 7a.

ARGUMENT

Petitioner contends that the court of appeals erred in finding a violation of the Confrontation Clause of the Sixth Amendment in a case where the state trial court precluded all cross-examination into the mental and emotional state of the crucial identification witness at the time he observed the perpetrator of the crime. Petitioner also contends that if there was a violation of the Confrontation Clause, it was harmless and that the court of appeals erred in "set[ting] a ide" factual findings of the district court concerning harmless error that were not "clearly erroneous." Rule 52(a), Fed. R. Civ. Pro. The court of appeals, applying well-settled principles of constitutional law, correctly found a violation of the Confrontation Clause in this case, however, and also correctly found that that violation was not harmless. Petitioner's argument that the court of appeals violated Rule 52(a) was not presented below, and, in any event, petitioner does not identify any factual findings of the district court that the court of appeals actually "set aside" in this case. This case presents no issue upon which certiorari should be granted.

Petitioner first suggests that defense counsel's inquiries into the feelings and reactions of the witness at the time of the crime were "irrelevant" or were not "germane" to the case, see Pet. App. at 12-13, and were thus not proper

subjects of cross-examination. But, as the court of appeals recognized, such inquiries, which implicate the witness's ability to perceive and remember, are plainly proper. Pet. App. at 5a ("the most significant means to probe [identification] testimony can be to question the witness about his thoughts and fears at the time of the crime"). Indeed, petitioner's argument is foreclosed by the state trial court's charge in this very case, for the trial court instructed the jury as a matter of New York law that the "mental and emotional state of the witness" was relevant to their decision.[2]

---

[2] This Court and others have also recognized the relevance of emotional factors in assessing the reliability of an identification. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 111-12 (1977) (because of the "circumstances of emergency or emotional stress" involved in a witness's encounter with a criminal, "[t]he witness' recollection of the stranger can be distorted easily"); United States v. Smith, 563 F.2d 1361, 1363 (9th Cir. 1977), cert. denied, 434 U.S. 1021 (1978) (emotions such as fright "might lessen the value of [the witness's] later selection of the accused"); Dickerson v. Fogg, 526 F. Supp. 1299, 1307 (S.D.N.Y. 1981), aff'd 692 F.2d 238 (2d Cir. 1982) (that witness was "extremely shaken" might have lowered degree of attention to robber's face). The inquiry into the witness's mental or emotional state is, indeed, no more than an inquiry into the witness's ability to perceive and to remember, and as such it is without doubt a proper subject of cross-examination. See United States v. Owens, 108 S. Ct. 838, 842 (1988) ("attentiveness," "eyesight" and "memory" permissible subjects of cross-examination); Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examiner may "test the witness' perceptions and memory").

Petitioner further argues, however, that "the Confrontation Clause does not prevent a trial judge from imposing reasonable limits on cross-examination." Pet. at 10. This principle is clearly true, of course, and the court of appeals explicitly recognized it, stating that "trial judges retain wide latitude, insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination." Pet. App. at 6a, quoting Delaware v. Van Arsdall, 475 U.S. at 679. But the court of appeals correctly found that the trial court's rulings amounted to the "total preclusion of cross-examination" on an issue of "vital importance" in the case, Pet. App. at 6a, and thus exceeded the permissible "reasonable limits" on cross-examination.

Petitioner's argument to the contrary, see Pet. at 12-13, that the preclusion of cross-examination was justified, is frivolous. Petitioner argues that because defense counsel's questions were "vague," "potentially confusing" or "superfluous," the trial court could properly preclude all of them. Pet. at 12-13. Counsel's questions were neither "vague" nor "potentially confusing," however, but inquired directly of the witness what his feelings were as he learned he was being robbed, how he reacted to the demand for money, whether he was scared, and whether he had previously been the victim of a robbery. These were simple questions susceptible of simple answers. Nor were these questions "superfluous."

That Small had admitted that he was surprised by the appearance of a man before the robbery began did not make superfluous further inquiry to determine what his subsequent emotions or fears were as he first learned he was being robbed and as the robber then threatened to "blow [his] fuckin' head off." The court of appeals was correct in finding that there was "no evidentiary basis to completely preclude this line of inquiry." Pet. App. at 6a.

Petitioner claims, however, that the Court of Appeal's "ruling stands in opposition to every decision of this Court on the subject of the Confrontation Clause and on the extent of federal intervention on collateral review, and similarly is in conflict with the other circuit courts." Pet. at 9 (emphasis supplied). But petitioner does not identify a single case decided by this Court with which the decision below is in conflict. Nor does petitioner show the decision below to be in conflict with the decision of any other circuit court of appeals. None of the cases cited by petitioner, Pet. at 11, n.4, involves limitations on cross-examination of the crucial eyewitness in a case resting solely on eyewitness identification, and none of them conflicts with the decision of the court of appeals below.

Petitioner argues in the alternative that even if the trial court's rulings violated the Confrontation Clause, the violation was harmless error. The court of appeals consid-

ered this question and correctly set out the legal standard for determining whether such a confrontation violation is harmless. Pet. App. at 6a-7a. To make such a determination, a court must consider many factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. at 684. Upon consideration of the relevant factors among these, the court can find an error harmless only if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id.

Here the error was plainly not harmless beyond a reasonable doubt based upon the crucial importance of Small's identification, the absence of any real corroboration for Small's identification, the overall weakness of the prosecution's case, and the hung jury at Harper's prior trial. As the court of appeals noted, the case was one based solely on eyewitness testimony, and Small gave the "key (and perhaps the only) evidence that the jury considered in convicting Harper." Pet. App. at 7a. Although Lester's testimony purported to corroborate that of Small's, the jury would not

have been likely to rely on it, because Lester failed to identify Harper as the gunman when given an admirable chance to do so just three weeks after the crime. Pet. App. at 7a; see Olden v. Kentucky, 109 S. Ct. at 484 (corroborating testimony of witness Russell did not render error harmless because it was "derivative" and had been "somewhat impugned"). Thus, the prohibited cross-examination would have attacked the crucial witness in the case concerning the crucial, indeed the only, issue in the case -- the identification of Harper as the robber -- an issue on which there was but weak corroboration for the witness.

In addition, of course, the state's case was "far from overwhelming." Olden v. Kentucky, 109 S. Ct. 480, 484 (1988). Small's identification had been made on the basis of a thirty-second observation at dusk of a black man wearing black clothing, sunglasses, and a black hat pulled down over his hair. The lack of a substantial opportunity to observe the criminal might alone have been grounds for finding reasonable doubts of Harper's guilt. In addition, however, when Lester was by chance presented with a sterling opportunity (untainted by any police identification procedures) to identify Harper as the man who robbed Small, he failed even to suspect that Harper was the man. His explanation, that Harper "looked different" than the robber, is perhaps the best evidence that Harper was indeed innocent of this crime.

The weakness of the prosecution's case is underlined by the hung jury at Harper's first trial. Not only was the jury at that trial divided in its views, but it was divided eleven to one in favor of acquitting Harper. Pet. App. at 10a. The real doubts of real jurors who heard the case are a significant factor in showing that a confrontation error was not harmless. Cf. Olden v. Kentucky, 109 S. Ct. at 482, 484 (inconsistent jury verdicts show prosecution's case was "far from overwhelming").

Given the "crucial" nature of Small's testimony on the crucial issue in the case, the weakness of the corroboration for his testimony, Lester's testimony that when he first viewed Harper, Harper "looked different" than the robber, Small's poor opportunity to view the robber, and the overall weakness of the prosecution's case, the error here was plainly not harmless. See Olden v. Kentucky, 109 S. Ct. at 484 (on essentially these factors, confrontation error not harmless).

It does not alter this conclusion that defense counsel stated in his summation that he was "sure" that Small was "very much afraid" at the time of the crime. The trial court explicitly instructed the jury that such arguments were not evidence and that it was the jury's sworn duty to decide the case solely on the evidence admitted during the trial. As the court of appeals noted, counsel's argument did not render

the error harmless, for "as juries are admonished during every trial, counsel's arguments cannot substitute for actual evidence." Pet. App. at 7a.

Petitioner argues, in addition, that the court of appeals erred in failing to apply to the district court's factual findings concerning harmless error the clearly erroneous test of Rule 52(a), Fed. R. Civ. Pro. Petitioner did not make this argument in the court below, and for this reason alone, certiorari should be denied. Moreover, petitioner has not shown that the court of appeals actually "set aside" any "[f]actual finding" made by the district court. Rule 52(a), Fed. R. Civ. Pro. Although petitioner lists a number of what it characterizes as factual findings made by the district court, see Pet. at 14, the court of appeals "set aside" none of these. The court of appeals agreed with the district court, for example, that defense counsel had been allowed to argue to the jury that Small's fear might have affected his identification. It also agreed that the trial court charged the jury to consider "the mental and emotional state of the witness." Pet. App. at 7a. It nowhere disputed the district court's conclusions that Small had seen the robber a moment before the robbery began or that Harper had been allowed other cross-examination of Small. And it did not deny that Lester corroborated Small; indeed it acknowledged that like Small, Lester identified Harper as the rob-

ber. Pet. App. at 7a. Because petitioner failed to raise this issue below and has not shown that the court of appeals "set aside" any factual finding of the district court, this issue does not warrant the grant of a writ of certiorari.[3]

The court of appeals was not required to accord the same significance to these undisputed facts that the district court did, nor was it precluded from considering other facts the district court ignored[4] or reaching a different legal conclusion from that reached by the district court. The ultimate decision whether a constitutional error is harmless is not a question of fact, but "is one of federal law." Rushen v. Spain, 464 U.S. 114, 120 (1983). Accordingly, the

---

[3] For these reasons, the court should deny certiorari notwithstanding that this issue is before the Court in McCleskey v. Kemp, No. 89-7024. Petitioner has not shown that he would be entitled to relief even if the outcome of McCleskey were to be favorable to him.

[4] The district court's analysis, upon which petitioner essentially relies, was flawed primarily by its failure to consider the most important factors relevant to harmless error in this case. The district court gave no consideration at all to the fundamental weakness of the prosecution's case, the crucial nature of Small's identification testimony, the vital importance of exploring the bases for Small's identification, Lester's testimony that just three weeks after the crime Harper did not look like the robber, or the prior hung jury in the case. See Delaware v. Van Arsdall, 475 U.S. at 684 (factors to consider include "the importance of the witness' testimony in the prosecution's case ... and, of course, the overall strength of the prosecution's case"); see also Olden v. Kentucky, 109 S. Ct. at 484 (error not harmless because witness's testimony "crucial," corroboration for it was weak, it was contradicted by other witnesses, and state's case was "far from overwhelming").

circuit courts of appeal that have considered the question have quite uniformly determined that the question is entitled to de novo review on appeal. Larson v. Tansy, 911 F.2d 392, 394 (10th Cir. 1990); Hall v. Wainwright, 805 F.2d 945, 947 (11th Cir. 1986), cert. denied, 484 U.S. 905 (1987); McKenzie v. Risley, 842 F.2d 1525, 1531 (9th Cir.) (en banc), cert. denied, 488 U.S. 901 (1988); Holland v. Attorney General, 777 F.2d 150, 156 (3d Cir. 1985); see also Hanrahan v. Greer, 896 F.2d 241, 244 (7th Cir. 1990) (question of correct standard of review open). On the facts found by the district court, the Court of Appeals correctly concluded that the error here was not harmless.

CONCLUSION

The petitition for a writ of certiorari should be denied.

Dated: New York, New York
February 26, 1991

Respectfully submitted,

DAVID A. LEWIS
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Respondent HARPER.

THE LEGAL AID SOCIETY

CRIMINAL APPEALS BUREAU • FEDERAL DEFENDER SERVICES UNIT

52 Duane Street - 10th Floor, New York, N.Y. 10007 (212) 285-2842

Executive Director and Attorney-in-Chief
Archibald R. Murray

Attorney-in-Charge of the Criminal Appeals Bureau
Philip L. Weinstein

Chief of Operations
Leonard F. Joy

Attorney-in-Charge
Henriette D. Hoffman

February 26, 1991

RECEIVED
FEB 27 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Honorable William K. Suter
Clerk
Supreme Court of the United States
Supreme Court Building
Washington, DC 20543

Re: KELLEY v. HARPER, 90-1130

Dear Mr. Suter:

Enclosed are ten copies of a brief in opposition to the grant of a writ of certiorari on behalf of respondent Elmer Harper, Jr., an application for leave to proceed in forma pauperis, and a certificate of service.

Three copies of the brief in opposition and one of the application for in forma pauperis relief have been served by first-class mail on ROBERT T. JOHNSON, District Attorney of Bronx County, Counsel of Record for petitioner.

Very truly yours,

DAVID A. LEWIS
Associate Appellate Counsel

DAL/hcs

Encl.

cc: Robert T. Johnson
District Attorney
Bronx County

No. 90-1130

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1130

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,

Petitioner,

v.

ELMER HARPER, JR.,

Respondent.

CERTIFICATE OF SERVICE

Counsel hereby certifies that three copies of the within brief in opposition and one copy of the application for leave to proceed in forma pauperis have been served by first class mail on Robert T. Johnson, District Attorney, Bronx County, Counsel of Record for petitioner.

Dated: New York, New York
February 26, 1991

DAVID A. LEWIS

THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner Harper.